23-504

April 23d.

Filed

R. S. 5597

SUPREME COURT OF THE UNITED STATES.

No. 9.—ORIGINAL.

EX PARTE: IN THE MATTER OF LOUISA C. MEDWAY, PETITIONER.

PETITION FOR MANDAMUS.

FILED APRIL 12, 1875.

Oct T 1874.

SUPREME COURT OF THE UNITED STATES

No. 9.—ORIGINAL.

EX PARTE: IN THE MATTER OF LOUISA C. MEDWAY, PETITIONER.

PETITION FOR MANDAMUS.

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1 Supreme Court of the United States, October term, A. D. 1847.

EX PARTE:
LOUISE C. MEDWAY.

To the Attorney-General of the United States:

Please take notice that I will, on Monday, April 12th, present to the Supreme Court the following petition for mandamus, together with accompanying affidavit, record, and brief.

THOMAS WILSON,
Attorney for Petitioner.

I acknowledge the recept of a copy of the above notice, and of the papers mentioned therein, this 7th day of April, 1875.

JOHN GOFORTH,
Assistant Attorney-General.

Petition for mandamus.

Now comes Thomas Wilson, attorney and counsellor of this court, and for the reasons and causes stated and set forth in the affidavit and record hereto attached, prays the court here, on behalf of Louise C. Medway, for a writ of mandamus, directed to the judges of the Court of Claims, commanding said court that, in the certain cause now depending in said court, wherein Louise C. Medway is plaintiff, and the
2 United States is defendant, it vacate its order of April 5th, 1875, and that it proceed in obedience to the mandate of this court, and in conformity to law and justice, to try, hear, and determine the same from the point reached by the reversal of said cause in this court, or show cause why the same has not been done.

THOMAS WILSON,
Attorney for Petitioner.

UNITED STATES OF AMERICA,
District of Columbia:

I, Thomas Wilson, being duly sworn, depose and say that I, as attorney for Louise C. Medway, plaintiff, filed a petition in the Court of Claims for the recovery, under the abandoned and captured property acts, of the proceeds of a certain number of bales of cotton, of which she was the owner, seized at Wilmington, North Carolina, sold in New York, the proceeds of which were then in the Treasury of the United States; that a trial was had, *and*, on the first day of June, 1871, *and* that court made and filed its findings of facts in said cause, the first paragraph of which was as follows:

"The claimant was the owner of 19 bales of sea-island and 75 bales of upland cotton, captured by the United States military forces at Wilmington, North Carolina, in February, 1865. The cotton so captured was turned over to the Treasury agent at Wilmington, and was sold in New York, in August, 1865. The net proceeds thereof are in the Treasury."

Upon the trial of said cause, the plaintiff made certain requests of the court to find certain facts, among others the following:

"5. That the average net proceeds of said cotton was $133.74 per bale in currency, and the whole amount of proceeds of said 130 bales is $17,386.20."

But the court failed and neglected to find the amount of said proceeds. Judgment was rendered against the plaintiff, who thereupon appealed to the Supreme Court.

3 The Supreme Court reversed the judgment, and remanded said cause to the Court of Claims for further proceedings in conformity to law and justice. All of which proceedings will more fully and at large appear by reference to the record in said cause, on file in the Supreme Court, under the number 155, October term, 1873.

On the 9th day of December, 1873, the plaintiff filed this mandate in the Court of Claims, and moved that court to proceed with the case from the point reached by the reversal, which she alleged to be in conformity with law and justice; but the said court and the judges thereof refused and still refuse to so proceed; and, upon the contrary, ordered that all the findings of fact originally made and filed, and upon which the case had been tried and decided in the Supreme Court, should be set aside and held for naught, and that a trial be had de novo.

All of which will more fully and at large appear by the copy hereto attached of the record of journal-entries made in said court, including, and subsequent to, the filing of the mandate of the Supreme Court.

The Court of Claims did not order a new trial under the provisions of section 2d of the act of June 25, 1868.

The defendant made a motion for rehearing, which was denied.

THOMAS WILSON.

Subscribed and sworn to before me this 7th day of April, 1875.

[SEAL.] A. J. FALLS, *N. P.*

Transcript of record or journal-entries of Court of Claims.

WASHINGTON, *Wednesday, December* 3, 1873.

The court met according to adjournment.

Present—Charles D. Drake, chief-justice; Edward G. Loring and Samuel Milligan, judges.

* * * * * * *

4 LOUISE C. MEDWAY } 3055.
vs.
THE UNITED STATES. }

Mr. Wilson filed the mandate of the Supreme Court herein, reversing the judgment of this court, and it was ordered that the case be placed on the January trial-docket.

WASHINGTON, *Wednesday, January* 27, 1875.

* * * * * * *

LOUISE C. MEDWAY } 3055.
vs.
THE UNITED STATES. }

Mr. Asst. Attorney-General Goforth filed motion for rehearing in this case.

WASHINGTON, *Monday, February* 1, 1875.

* * * * * * *

LOUISE C. MEDWAY
vs. } 3055.
THE UNITED STATES.

The motion for a rehearing of this case was argued by Mr. Johnson, for the defendants, for the motion, and Mr. Wilson opposed and submitted.

WASHINGTON, *Thursday, Feb'y* 4, 1875.

* * * * * * *

LOUISE C. MEDWAY
vs. } 3055.
THE UNITED STATES.

The motion for a rehearing in this case was overruled.

WASHINGTON, *Thursday, Feb'y* 11, 1875.

* * * * * * *

LOUISE C. MEDWAY
vs. } 3055.
THE UNITED STATES.

This case was argued by Mr. Wilson for the claimant, and Mr. Johnston for the defendants, and submitted. Mr. Assistant Attorney-General Goforth filed request for the court to file findings of fact.

WASHINGTON, *Monday, April* 5, 1875.

* * * * * * *

LOUISE C. MEDWAY
vs. } 3055.
THE UNITED STATES.

5 Whereas on a hearing of this case upon its merits, this court, on the 1st day of June, 1871, filed findings of fact, wherein the claimant's damages, if any, were not found and set forth, and thereupon adjudged and decreed that the claimant take nothing by her suit, and that her petition be dismissed; from which judgment and decree the claimant took an appeal to the Supreme Court, which was duly allowed and entered in said court.

And whereas, on the 17th day of November, 1873, the Supreme Court ordered and adjudged that said judgment be reversed and that the cause be remanded to this court for further proceedings in conformity to law and justice, and on the 9th day of December, 1873, the mandate of the Supreme Court therein was filed herein; the case coming again before the court for hearing, the petitioner moved that the court find only the amount of damages omitted from the former findings, and thereafter enter judgment upon the original findings with that addition thereto.

And now the court, after due consideration, refuses to grant the petitioner's request, and orders that said original findings be set aside and a new trial had de novo on the merits, as in their opinion law and justice require.

Filed 12 April, 1875.

True copy: Test.

[SEAL.]

D. W. MIDDLETON,
Clerk Sup. Court U. S.

6 Supreme Court of the United States, October term, 1874.

EX PARTE: LOUISA C. MEDWAY, petitioner. } No. 9. Original.

On consideration of the petition filed in this cause by Mr. Thomas Wilson, it is now here ordered that the judges of the Court of Claims show cause on Friday, April 23d, A. D. 1875, why a writ of mandamus should not be issued to said court to compel it to vacate its order of April 5th, 1875; and that it proceed, in obedience to the mandate of this court, and in conformity to law and justice, in the case depending in said Court of Claims wherein Louisa C. Medway is claimant and the United States defendant.

19TH APRIL, 1875.

I, D. W. Middleton, clerk of the Supreme Court of the United States, hereby certify that the foregoing is a true copy of the order of said Supreme Court entered in the above-entitled cause, as the same remains upon the official records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Sup. C't this 19th day of April, A. D. 1875.

[SEAL.] D. W. MIDDLETON,
Clerk Sup. Court U. S.

(Indorsed:) Sup. Court United States. October term, 1874. No. 9. Original. Ex parte: Louisa C. Medway. Rule to show cause, &c.

7 EX PARTE: LOUISE C. MEDWAY. } No. 9. Original.

To the Supreme Court of the United States:

In answer to the rule made by the Supreme Court of the United States in the above case, requiring the judges of the Court of Claims to show cause why a writ of mandamus should not be issued to said Court of Claims to compel it to vacate its order of April 5, 1875, and to proceed, in obedience to the mandate of the Supreme Court, and in conformity to law and justice, in the case depending in said Court of Claims wherein Louise C. Medway is claimant and the United States are defendants, the chief-justice and two of the judges, being a majority of said Court of Claims, now come and respectfully submit to the Supreme Court the following statement of facts connected with the action of the Court of Claims in the said case of Louisa C. Medway vs. United States
8 since the reversal by the Supreme Court of the judgment therein rendered.

On the 9th of December, 1873, Thomas Wilson, esq., filed in the Court of Claims the mandate of the Supreme Court reversing the judgment of the Court of Claims in said case of Louise C. Medway, and it was ordered that said case should be placed on the trial-docket.

On the 5th of February, 1874, the said case was argued and submitted to the court on the printed evidence and briefs of the parties.

At that time the following rule was in force in said court:

9 "XXXVII.—FINDINGS OF FACTS.

"In cases where a finding of facts by the court is required by the rule of the Supreme Court, either party desiring the same to be made

shall, before or at the time of the submission of the cause, file a request that the court make such a finding.

"If neither party make such a request, it will be considered that a finding is not desired, and none will be made.

"When such a request is made, the court, before proceeding to decide the cause, will file its finding of facts; and the date of the filing thereof shall be entered by the clerk in a separate book to be kept in his office for that purpose; and such entry shall impart notice of such filing to both parties.

"Within one week after such filing either party may file a written request to the court to find specifically any facts not already found which such party may deem material to the judgment in the case; and the court will pass upon the request when its final decision of the cause is rendered.

"If within the week no such request be filed, the court's finding
10 will be considered as agreed to by both parties, and the court will proceed to decide the cause upon the basis of that finding.

"For good cause shown, the court may allow either party to file such request after the expiration of the week, but before the announcement of the final decision of the cause.

"For the purposes of this rule, the hearing of a cause will be considered as continuing open until the parties shall have had the opportunity, herein authorized, of requesting the finding of specific facts."

On the 9th of February, 1874, Thomas Wilson, esq., asked and obtained leave of the court to file, and then filed in said case, nunc pro tunc, as of the 5th of February, a request for the court to file findings of facts under the above rule.

11 On the 13th of April, 1874, the court ordered that the said case should be remanded to the trial-docket.

On the 15th of February, 1875, the said case was again called for trial, when the said Thomas Wilson for the first time moved the court to proceed with the case from the point reached by the reversal; and it was upon the motion then made that the Court of Claims made the order of April 5, 1875, which is subjoined to the petition of said Louisa C. Medway for a mandamus.

Upon these facts the undersigned were of the opinion—

First. That the mandate of the Supreme Court left the Court of Claims to decide what further proceeding in said case would be in conformity to law and justice; and

Secondly. That it was in conformity to law and justice to set aside the findings of fact which had been made on the first trial, and try the case de novo; and thereupon the said order of April 5, 1875, was made.

The foregoing constitute all the cause which the undersigned have to show why a mandamus should not issue herein.

April 21, 1875.

C. D. DRAKE.
E. G. LORING.
WM. A. RICHARDSON.

(Indorsed:) Sup. Court U. S. 1874, Octo. term. Original. No. 9. Ex parte: Louisa C. Medway, petitioner. Petition for mandamus.

Supreme Court of the United States.

APRIL 19th, 1875.

Ex-parte LOUISE C. MEDWAY.

[Original No. 9.]

BRIEF OF THOMAS WILSON ON BEHALF OF THE PETITIONER IN SUPPORT OF MOTION FOR MANDAMUS.

Statement of the Case.

This is a cotton claim brought in the Court of Claims under the abandoned and captured property acts.

There are (or were) four issues to be tried: 1st. Ownership; 2d. Seizure; 3d. Sale, and proceeds deposited in Treasury; and 4th. Loyalty, or in case of alienage, neutrality.

Upon the trial the court found in favor of the plaintiff, upon the first three issues, but against her in the fourth, and so her petition was dismissed. It found the facts to be that she was the owner of 19 bales of sea-island and 75 bales of upland cotton; that they had been seized by the United States officers, sold in New York, and that the proceeds thereof were then in the Treasury. But the court failed or neglected to make a computation of the amount of such proceeds in dollars and cents. This neglect arose from no fault of the plaintiff; for her attorney, in accordance with the rules prescribed by this court, made a specific request of the Court of Claims, upon the trial, to find this particular fact. These findings of fact and this request were duly filed, and became part of the record.

The plaintiff appealed to the Supreme Court. The judgment was reversed, and the cause remanded for further proceedings in conformity with law and justice. The record in the Supreme Court contained the foregoing findings and showed the failure of the Court of Claims to make the computation and state the amount of proceeds.

The rules of the Supreme Court provide a remedy for the correction of such errors or failures.

If a proper foundation has been laid by making, at the time of trial, a request for the finding of a material fact, the Supreme Court will grant its rule requiring the Court of Claims to answer the request and find the fact either affirmatively or negatively. This course was pursued by the plaintiff. Her attorney moved this court for such rule requiring the Court of Claims to find the amount of said proceeds, according as the fact might be, and certify the same back to this court. But we were met by a counter-motion of the defendants. The United States by its Assistant Attorney General made confession of the errors in the judgment, and consented or requested that it should be reversed.

The judgment being reversed upon the request of the appellee, and the cause having to be remanded, this court declined the supererogatory labor of requiring an answer to a rule in a cause which, when the answer was made, must be immediately returned to the court which made it for judgment. And so the rule was not issued. The cause was remanded for further proceedings.

Upon its arrival in the court below, instead of proceeding with the cause from the point reached by the reversal, and making the necessary computation of the amount as would have been required in case the rule had been issued, that court set aside the entire findings and ordered a re-trial of those issues of fact which had before been settled and determined, and which being certified to the Supreme Court on appeal, formed the basis of the reversal. Instead of proceeding *forward*, that court began by proceeding *backward*.

It was clearly its duty to have accepted as final those facts which had been before the Supreme Court, and upon which the case had been reversed, and to have made that computation which it before had neglected to make in response to the plaintiff's request, and then to have rendered judgment.

Its action in this behalf was manifestly a refusal to obey the mandate of the Supreme Court, and a refusal to proceed in conformity with law and justice. To enforce obedience to the mandate of the court and to compel further proceedings conformity with law and justice, the writ of mandamus is invoked.

Proposition of Law.

The court below having once tried the case, and having decided every question of fact arising in it, except making the computation and statement of the amount in dollars and cents, and having filed its findings in the nature of a special verdict, and an appeal had to the Supreme Court, which reversed the judgment, and remanded the cause for further proceeding, the court below should be now required to proceed from the point reached by the reversal, and cannot go back over and re-try those questions of fact which were settled and determined on the former trial, and which, being certified to the Supreme Court on appeal, formed the basis of its reversal.

Authorities.

When a case has been appealed, and decided on appeal, the decision of the appellate court made in the case is to be regarded as the law of *that case*, and cannot be questioned in *that case* in the lower court, neither by bill of review nor in any other manner.

Cameron *vs.* McRoberts, 3 Wheat., 591.
White *vs.* Atkinson, 2 Call, (Va.,) 376.
Price *vs.* Campbell, 5 Call, (Va.,) 115.

Campbell *vs.* Price, 3 Mun., (Va.,) 227.
Cunningham *vs.* Ashley, 14 How., 377.
Same case, 13 Ark., 653.
Lyon *vs.* Merritt, 6 Paige, (Chan.,) 473.

Nor can it be questioned in the appellate court after the close of the term, neither by motion for a re-hearing, bill of review, or second appeal.

Browder *vs.* McArthur, 7 Wheat., 58.
Ex parte Sibbald, 12 Peters, 488, 492.

Not even when the appellate court nor the lower court had jurisdiction which was not discovered until after the term.

Skillern *vs.* May, 6 Cr., 267.
Wash. Bridge Co. *vs.* Stewart, 3 How., 413, 424.

Nor where it could be shown that the complainant was dead at the time the original decree was passed, and that the suit had abated by reason thereof.

Ex parte Story, 12 Peters, 339, 343.

Nor for any purpose, except to correct mere clerical errors.

It is the duty of the lower court to carry into effect and execution, promptly and without delay, the mandate of the appellate court. It must do this literally and without evasion.

It must proceed with the case from the point reached by the reversal.

Cox *vs.* Pruitt, 25 Ind., 90.
So. Fork Canal Co. *vs.* Gordon, 2 Abbot, U. S. Rep., 479 (by Judge Field., 9th Cir., Cal., 1868.)
West *vs.* Brashear, 14 Pet., 54.
Exparte Dubuque and Pacific R. R., 1 Wall., 69.

If the defendant has two defenses to his action in the lower court, on the first of which he is defeated, and on the second he is sustained, and the judgment or decree entered in his favor, then the *plaintiff* appeals and the decree is reversed *as to the second defense;* it is then too late for the defendant to rely upon the first defense or the error of the court in defeating it. It is too late in either the upper or lower court. If he desired to test the correctness of the ruling of the court as to that defense, he also should have appealed. Having chosen to abide by the second *and lost*, he must stand it. He cannot then be allowed to go back and rely upon his first defense. No second appeal will be permitted.

Corning *vs.* Troy Iron and Nail Factory, 15 How., 451, 464, (20 Curt., 595 to 598.)
Williams *vs.* Gibbs, 20 How., 535, 540.
Roberts *vs.* Cooper, 20 How., 467, 481.

After judgment *on appeal on an agreed statement of facts*, or *facts found by the judge sitting as a jury*, or a *special verdict*, the defeated party cannot have a second trial in order to give him a chance to change the facts. "Such a practice would open the door to fraud and perjuries innumerable."

Gunter *vs.* Laflin, 7 Cal., 592.
Roberts *vs.* Corbin & Co., 28 Iowa, 355.
Exparte Dubuque and Pacific R. R., 1 Wall., 69.
Table & Co., *vs.* Shanahan, 21 Cal., 548.
Argenti *vs.* San Francisco, 30 Cal., 458, 463, 465, 466.
Santa Maria, 10 Wheat., 431.
Martin *vs.* Hunter's Lessee, 1 Wheat., 304, 355, (3 Curt., 581.)
Williams *vs.* Gibbs, 20 How., 535, 540.
Cunningham *vs.* Ashley, 13 Ark., 653.
Soule *vs.* Dawes, 14 Cal., 194.
Affirmed Crowell *vs.* Gilmore, 17 Cal., 194.

The above rule does not apply where a case was tried by a jury and exceptions taken to instructions and writ of error, nor error in overruling motion for new trial.

In those cases the evidence and not the facts go up.

Bagley *vs.* Eaton, 10 Cal., 149.

Cases may be found where a new trial was ordered where a special verdict did not find all the facts necessary to a complete decision of the case. But this applies solely to cases where the facts were found by a jury, and where the additional facts must also be tried before and found by a jury. It can have no reference to those cases where the remaining facts are only those of computation, and are to be found and determined by the court sitting for the trial of questions of fact.

Argument.

The finding of facts set forth in the record remained on file in the Court of Claims; it continued to be part of its record.

The judgment alone was reversed. The finding of fact remained unreversed and in full force, the same as would a case stated, the report of an auditor, or a special verdict. This is admitted by the court in its order of April 5th, setting the same aside.

But for this finding as to ownership, seizure, sale, and proceeds in the Treasury, the judgment would not have been reversed. It was upon these findings that the reversal was made; yet the Court of Claims, upon regaining jurisdiction of the case, so far ignore the action of the Supreme Court as to strike out and set aside the finding of those facts upon which that court based its reversal.

If the proposition which I contend for is incorrect, then no decision of the Court of Claims is final *upon the facts*, and the different issues in a case may be determined *seriatim*, with an appeal to the Supreme Court intervening between

each decision. If upon each reversal and remanding there be allowed a trial *de novo*, there may be injected another and a new defence, which may result in another decision upon another issue, and the granting of another appeal, and so on, until the last issue is disposed of by the second, third, or perhaps fourth appeal, the number of appeals being limited only by the number of issues in the case.

This is the inevitable result of the position taken by the Court of Claims. That it is erroneous is clearly shown by the authorities I have cited above. Take the case at bar as an illustration:

Upon this proposed second trial, the court might again find in favor of the plaintiff upon the issues of ownership and seizure, but suppose a new defence is set up, and some new facts found respecting the sale and proceeds in the Treasury, upon which judgment is again rendered for the defendants. I appeal. The case is again reversed, remanded, the former finding set aside, and the third trial *de novo* ordered. Thereupon, the court again finds in favor of the plaintiff upon the issue of ownership, but another defence set up, some new facts found respecting seizure, upon which judgment is again rendered for the defendants. I take the third appeal, and it is again reversed and remanded. The former findings are again set aside, and a fourth trial *de novo* ordered, a new defence set up of want of ownership, facts found against the plaintiff, judgment for defendants, fourth appeal, reversal, and remanding, when judgment may be at last rendered in favor of the plaintiff. If that judgment included the internal revenue tax, which was the subject of dispute in the Dominic O'Grady case, (MSS. Op. Justice Clifford, present term,) then it might require the fifth appeal to, and decision by, the Supreme Court of the United States to settle and finally determine one little cotton case, the number of appeals taken being equal to the number of issues in the case. If it be said that there cannot be five appeals in one case, I say there cannot be two.

In the case of James Peay *vs.* Kentucky, No. 408, opinion delivered last Monday, it was decided that this court would not take jurisdiction on appeal until the merits of the case had been disposed of by the court below; and in the North Carolina R. R. Co. *vs.* Swaney, No. 637, delivered same day, both opinions by the Chief Justice, it was decided that the merits were not disposed of by the court below, while the amount remained unsettled and undetermined.

The plaintiff in the case at bar sought by rule of this court to have the amount of proceeds found and stated by the court below, thus presenting the entire case upon its merits. The defendants, by requesting a reversal, cannot forestall the court, and make its decision less final than it would otherwise have been, and so impose upon the plaintiff the expense and delay of a second appeal, nor upon the court the trouble and labor of a second examination and decision.

I ask the issuance of a rule upon the judges of the Court of Claims to show cause why a writ of mandamus should not issue. There being no dispute as to the facts, they all being matters of record, owing to the near approach of adjournment, I ask that it be made returnable at an early day.

THOMAS WILSON,
Attorney for Petitioner.

Dismissed 23-5-04 Rule
Record not Printed

IN THE

SUPREME COURT

OF THE

UNITED STATES.

No 5-74

To the October Term, A. D. 1874.

The Chicago & Alton R.R. Co.
PLAINTIFF IN ERROR.

vs.

Henry C. Wiswall,
DEFENDANT IN ERROR.

} Error to the Circuit Court for the Southern District of Illinois.

MOTION TO DISMISS WRIT OF ERROR.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

Oct. D. 1874

In the Supreme Court of the United States.

October *Term, A. D. 1874.*

THE CHICAGO & ALTON R. R. CO.
Plaintiff in Error,
vs.
HENRY C. WISWALL,
Defendant in Error.

Error to the Circuit Court for the Southern District of Illinois.

The above named Plaintiff in Error is hereby notified that we shall, on the 18th day of January, A. D. 1875, or as soon thereafter as counsel can be heard, enter a motion to dismiss the writ of error issued herein. You will find herewith a copy of the motion, together with the brief and argument in support of the same.

Respectfully,

E. C. Brady
Arthur Ripley

~~WM. BROWN~~,
Att'ys for Def't. in Error.

I have received a copy of the above notice, together with the motion, brief and argument of defendant in error in support thereof, this ——— day of ——————— A. D. 187—.

Att'y for Plaintiff in Error.

In the Supreme Court of the United States.

October *Term, A. D. 1874.*

THE CHICAGO & ALTON R. R. CO.,
Plaintiff in Error.

vs.

HENRY C. WISWALL,
Defendant in Error.

Error to the Circuit Court U. S. for the Southern Dist. of Illinois.

And now this day comes the defendant in error and moves the court to dismiss the writ of error issued herein; because,

1st—It is issued without warrant of law.

2nd—The Circuit Court of the United States for the Southern District of Illinois, to which the writ of error is prosecuted, had no jurisdiction of this cause.

3d—The petition of plaintiff in error, upon which the *certiorari* from the court below was issued, was not in law sufficient to give the court below jurisdiction of the persons or subject matter of the litigation between the parties to this suit.

4th—There is no final judgment, order or decree of the court below to reverse which the writ could be prosecuted.

E. G. Brady
John W. Rose
~~WM. BROWN~~,
Att'ys for Def't in Error.

BRIEF AND ARGUMENT.

MAY IT PLEASE THE COURT:

The defendant in error instituted his action *on the case* against the plaintiff in error in the Circuit Court of Morgan County, Illinois, in the month of January, A. D. 1873, for injuries resulting to him by reason of the defendant's having brought Texas cattle into Morgan County, Illinois, as he alleges, in violation of an Act of the General Assembly of the State of Illinois, known as the "Texas Cattle Act."

On the 30th day of April, 1874, and whilst this proceeding was pending in the Circuit Court of Morgan County, Illinois, the plaintiff in error sued out of the office of the Clerk of the Circuit Court of the United States for the Southern District of Illinois, a writ of *certiorari*, directed to the Circuit Court of Morgan County, Illinois, commanding that court to "*certify, and send the record and proceedings aforesaid with all things concerning the same to the said Circuit Court of the United States,*" and in obedience to this writ the record and proceedings therein were certified to that Court from the State Court.

On the 18th of June, A. D. 1874, on the motion of defendant in error, the Circuit Court of the United States made its order that the cause be remanded to the State Court, and it is to reverse that order that this writ of error is prosecuted.

The Plaintiff in Error is a corporation existing under the laws of the State of Illinois; has its line of road, and is exercising its rights under its charter in that State; therefore,

for the purposes of this suit in contemplation of law, it is a citizen of that State. The defendant in error, also a citizen of the State of Illinois, was prosecuting his suit against it in the State courts for injuries alleged to have been sustained by him in consequence of acts alleged to have been committed by plaintiff in error in contravention of the laws of the State of Illinois. Under such circumstances and conditions the United States courts can have no original jurisdiction of the case, unless the plaintiff in error can bring itself and this cause within the scope and spirit of the recent amendments to the Constitution of the United States and the laws of Congress passed under and to execute those amendments.

That the plaintiff in error has not, by its petition, brought itself within the letter or purpose of those amendments and laws is conclusively settled by this court.

Slaughter house cases, 16th Wallace, 36.

It is therefore concluded that the Circuit Court of the United States did not, by the proceedings below, obtain jurisdiction of this cause, and could do no more or less than remand the same to the Circuit Court of Morgan County, Illinois.

In such cases as this, if by any proceeding in the State courts any right of plaintiff in error, in which it is guaranteed by the Constitution or laws of the United States should

be infringed, this court has *a* jurisdiction, but it is an appellate jurisdiction, and a writ of error could be prosecuted to the court of the State of Illinois, which had jurisdiction to and had determined the litigation between the parties to reverse its final determination.

(Miller vs. Joseph et. al., 17 Wallace, 655.)

There being no legislation under which the federal courts could oust the State court of its jurisdiction in cases like the one under consideration, this cause is now and has remained undetermined within the jurisdiction of the Circuit Court of Morgan County, Illinois, although that court has been disturbed in the exercise of that jurisdiction by the removal of the records and files in the case.

If we are correct in the conclusion that the Circuit Court of the United States acquired no jurisdiction to hear and determine the controversies between the parties, then the writ of error will not properly lie to reverse the decision of that court, remanding the cause to the State court for trial, and it follows that the question of jurisdiction may be reached by motion to quash the writ of error.

A writ of error prosecuted to a court not having jurisdiction to determine the cause will be dismissed.

Miller vs. Joseph et. al., 17th Wallace, 655.

The order of the Circuit Court of the United States remanding this cause to the State Court was not such an order

as to determine the litigation between the parties, and hence it was not a "*final judgment*," or "*final decree*," or "*final order*," from which an appeal lies, or to reverse which either party could prosecute a writ of error. A writ of error to such an order as is complained of by plaintiff in error should be dismissed.

St. Clair County vs. Lovingston, 18 Wallace, 628.

Moore vs. Robbins, 18 Wallace, 588.

These cases rscognize the practice of dismissing a writ of error on motion when improperly sued out.

It is respectfully submitted that this motion should be entertained, and the writ of error dismissed with "just damages for delay" instead of awaiting a final trial, for the necessary delay attending the call of the cause in its order might seriously jeopardize the rights of the parties.

E. C. Brearley
John W. Kopf

~~WM. BROWN~~,
Att'y for Def't in Error.

The Chicago & Alton R.R. Co. *Plaintiff in Error.*
vs.
Henry C. Wiswall, *Defendant in Error.*

Error to the Circuit Court for the So'thn Dist. of Ill.

Motion to Dismiss Writ of Error.

BRIEF AND ARGUMENT

OF DEFENDANT IN ERROR.

Supreme Court United States.

THE CHICAGO AND ALTON R. R. Co.
v.
HENRY C. WHISWELL.
No. 572.

Brief of P. PHILLIPS,

In opposition to motion to dismiss.

An action having been commenced in the State Court by Whiswell, against the Corporation, the same was removed by certiorari into the Circuit Court, United States.

Subsequently on the hearing that court determined it had no jurisdiction, and entered up accordingly a judgment or order remanding the case to the State Court. A writ of error from this court was thereupon sued out.

A motion is now made to dismiss the writ of error on two grounds:

1st. That the Circuit Court had no jurisdiction of the case.

2d. That there is no final judgment.

As to the first point, it is sufficient to say that the want of jurisdiction in the court below is not a ground for dismissal. This can only be decided when the cause is heard. Nelson v. Leland, 22 How., 48.

On the second point we say—that the order or judgment of the Circuit Court disposed of the case in its entirety so far as that court was concerned. It considered the case and determined it had no jurisdiction. The order remanding it to the State Court was in effect a dismissal of the case.

A dismissal of a bill in Equity on the ground of a want of jurisdiction is a final decree on which an appeal will lie.

There would seem to be no reason why a judgment of dismissal in an action at law would not in like manner be subject to a writ of error.

It is, however, due to the court to call its attention to the case of Insurance Company v. Comstock, 16 Wall, 258.

This was a proceeding in bankruptcy against the Company. On an issue denying the allegations of the petition, there was a verdict and judgment against it, whereupon the case was removed by writ of error to the Circuit Court. There the case was dismissed for want of jurisdiction, and the case came here on writ of error.

The court held that the Circuit Court was rightfully possessed of jurisdiction, but that mandamus was the proper remedy and dismissed the writ of error.

For this proposition the case of Ayers v. Carver, 17 How., 591, is referred to. We respectfully submit that this case does not sustain the proposition, or in any manner refer to it.

The court also in the opinion refers to the cases of Exparte Bradstreet, 7 Pet., 647; and Kendall v. United States, 12 Pet., 622.

In neither of these cases is the proposition now contended for adverted to.

In the first case, a mandamus was granted to perfect a record.

In the second case, it was issued to compel an officer to execute a ministerial duty.

We see no reason why the error of a judge in dismissing the case for want of jurisdiction may not be remedied by writ of error.

The mandamus is a writ to compel action.

Here the court has acted by determining that it had no jurisdiction. To compel it to take jurisdiction by mandamus, is in effect to reverse its judgment, and this is not the office of a mandamus, but is the office of a writ of error.

That the action of the Circuit Court was final—cannot be denied.

Whether its action is to be designated as an order or a judgment, would seem to be immaterial.

The act of 1789, it is true uses only the words final decrees and judgments, but words are immaterial—The object of the act was to afford redress when the cause was finally determined against a party.

The act of 1872, 1 June, uses the words judgment, decree, or *order*; and we believe this only expresses the intent of the act of 1789.

At any rate the word "order" thus introduced, would seem to remove any doubt as to the appellate jurisdiction, when such an "order" is the final disposition of the case.

P. PHILLIPS,
for Plaintiff in Error.